BRIGHT COAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-73 Decided August 15, 1988

Appeal from a decision of Administrative Law Judge Joseph E. McGuire denying appellant's application for review of Cessation Order No. 84-83-71-01. NX 4-38-R.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

   When a permittee has failed to abate a violation within the abatement period stated in a notice of violation, OSMRE is obligated by sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1271(a)(3) (1982), to issue a cessation order.

2. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

   When OSMRE and a coal company execute a comprehensive and detailed settlement agreement setting up a schedule of payment of specified reclamation fees and penalties due and owing to the Government, a cessation order outstanding at the time of execution, but not listed in the agreement, is not subject to that agreement.

APPEARANCES: Ronald G. Polly, Esq., Whitesburg, Kentucky, for appellant; R. Anthony Welch, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Kentucky, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Bright Coal Company, Inc. (Bright), has appealed from a September 26, 1986, decision by Administrative Law Judge Joseph E. McGuire denying

Bright's application for review of Cessation Order (CO) No. 84-83-71-01, issued by the Office of Surface Mining Reclamation and Enforcement (OSMRE).

On March 21, 1984, OSMRE Reclamation Specialist Steven R. Cassel, Sr., issued and served Notice of Violation (NOV) No. 84-83-71-002 upon Bright's superintendent, Eli Banks. The NOV cited Bright for violation of 30 U.S.C. | 1232 (1982), as well as its regulatory analog, 30 CFR 870.15, because of Bright's failure to pay Federal reclamation fees based on coal produced in the course of Bright's coal mining operations. The NOV called for full payment of all delinquent reclamation fees by April 2, 1984.

On April 11, 1984, after determining that Bright had not abated NOV No. 84-83-71-002 by paying its delinquent reclamation fees by April 2, 1984, Cassel issued CO No. 84-83-71-01. The CO was served upon Bright by certified mail.

Bright filed an application for review of CO No. 84-83-71-01 pursuant to section 521 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. | 1271 (1982). OSMRE filed an answer and a hearing was held before Judge McGuire in Abingdon, Virginia, on September 24, 1985.

Judge McGuire's decision summarizes the evidence developed at the hearing as follows:

> Respondent's evidence consisted of the testimony of OSM Reclamation Specialist Steven R. Cassel, Sr., as well as seven documentary exhibits which were identified and entered into evidence as Respondent's Exhibits l through 7. Applicant's evidence was comprised of the testimony of Jim Hogg, its president, together with six documentary exhibits designated and entered into evidence as Applicant's Exhibits 1 through 6. Those sources have provided the following facts.
>
> On August 4, 1983, the Solicitor's Office filed a com-plaint for collection of delinquent reclamation fees, Civil Action No. 83-262 (Respondent's Exh. 5), in the United States District Court for the Eastern District of Kentucky, Pikeville Division, seeking $15,699.62, for reclamation fees due for the second and third quarters of 1980. On April 23, 1984, judgment was entered for the Government in the amount of $12,858.54 for reclamation fees and $3,169.01 for prejudgment interest (Respondent's Exh. 3). Following the issuance of the NOV and the CO, OSM filed suit in the United States District Court for the Eastern District of Kentucky, Civil Action No. 84-194, on June 12, 1984, for $45,447.40 in delinquent fees due for the fourth quarter of 1982 and the entire year of 1983 (Respondent's Exh. 6). On October 22, 1984, the Government was awarded a final judgment in the amount of $45,447.40 for reclamation fees and $6,551.65 for prejudgment interest.
>
> On December 18, 1984, respondent and applicant entered into a "Payment Agreement," in order to settle the two judgments

> rendered against applicant in Civil Action Nos. 83-262 and 84-194, as well as the delinquent fees involved in NOV No. 84-83-71-002 and to establish a plan of payment (Respondent's Exh. 4 and Applicant's Exh. 5). Pursuant to that agreement, applicant moved to dismiss the application for review of the NOV (Docket No. NX 4-25-R) (Applicant's Exh. 6). An appropriate order of dismissal was entered by [Administrative Law Judge] Judge [Frederich A.] Miller on February 15, 1985 (Respondent's Exh. 4).
>
> OSM Reclamation Specialist Steven Cassel, Sr. (Cassel), testified that he had issued NOV No. 84-83-71-002 and CO No. 84-83-71-002 after discovering applicant's delinquent reclamation fees from a computer run of the automatic data system through the central office in Denver, Colorado. He stated that applicant was allowed approximately 2 weeks to abate that NOV by remitting payments in full of all outstand-ing reclamation fees covering the inactive mine [Tr. 25-26].
>
> On cross-examination, he testified that he terminated NOV No. 84-83-71-01 and CO No. 84-83-71-01 on July 19, 1985, after having been instructed that termination of the NOV was the appropriate action in view of the December 18, 1984, payment agreement, in which he had not participated [Tr. 50-51].
>
> Jim Hogg, president of Bright Coal Company, Inc., indicated that applicant had failed to pay its reclamation fees because of its financial inability to do so. He explained that arrangements had been made for Lake Coal Company to purchase applicant's coal upon the completion of construction of a washing plant, at which time applicant would be able to pay its delinquent reclamation fees. Mr. Hogg also testified that applicant was denied a new mining permit because of the outstanding NOV and CO and that that fact led to the negotiation of the December 18, 1984, payment agreement [Tr. 59-60].
>
> Mr. Hogg further testified that he understood that the payment agreement settled all OSM violations involving applicant. He stated that following the negotiation of the payment agreement, a check for [$15,000] was delivered to OSM and applicant resumed mining in March of 1985, under a new permit [Tr 61].

(Decision at 2-3).

Judge McGuire determined that the principal issue was whether the December 18, 1984, payment agreement between Bright and OSMRE included settlement of CO No. 84-83-71-01. Judge McGuire held that the agreement did not, stating:

> If applicant had intended that the CO be included in the payment agreement, together with the NOV, it should have specifically included that fact in the wording of the payment agreement. Because that CO had been issued for some eight months prior to the

> signing of the payment agreement, applicant had ample opportunity to incorporate that CO into the payment agreement. Allowing applicant to incorporate that CO into the payment agreement through the use of oral testimony would constitute a violation of the parole evidence rule since it would have the effect of allowing parole evidence to vary the terms of a written agreement.

(Decision at 4).

[1] Appellant does not contend that it had paid Federal reclamation fees for coal produced by coal mining activities when the NOV was issued or that it had not violated 30 U.S.C. | 1232 (1982) and the implementing regulations in 30 CFR 870.12 and 870.15. Under these provisions an operator is to pay a reclamation fee on each ton of coal produced for sale, transfer, or use, including the products of in situ mining, based on calendar quarter tonnage. The fee is to be paid no later than 30 days after the end of each calendar quarter.

The record confirms that NOV No. 84-83-71-002 and CO No. 84-83-71-01 were issued for Bright's failure to pay outstanding reclamation fees due for certain periods in 1980, 1982, and 1983, and that these fees were already the subject of two judgments obtained against appellant in Civil Action Nos. 83-262 and 84-194. However, OSMRE is not limited to litigation in its efforts to collect overdue reclamation fees and resulting interest. The regulations at 30 CFR 870.15(e) provide that failure to pay fees "may result in one or more of the following actions: initiation of litigation; (2) reporting to the Internal Revenue Service; (3) reporting to State agencies responsible for taxation; (4) reporting to credit bureaus; or (5) referral to collection agencies. Such remedies are not exclusive." (Emphasis added.) Consequently, OSMRE may use whatever means it deems appropriate to induce payment of overdue reclamation fees.

At the time the NOV and CO were issued, back fees were due, owing, and collectible. Although OSMRE reclamation specialist Cassel admitted he was unaware of the judgments and settlement negotiations when he issued the NOV and order, appellant was in violation of the law at the time of issuance. Use of the NOV and CO was a legitimate means for inducing payment of outstanding obligations.

Appellant neither challenges its obligation to pay back fees when the NOV was issued, nor alleges abatement of the cited violation by April 2, 1984, the time set for abatement of the NOV. Hogg admitted that the company was financially unable to pay reclamation fees due at that time (Tr. 59). On these facts, Judge McGuire concluded that OSMRE properly issued the CO for failure to abate the violation. We agree. In such circumstances OSMRE is obligated by section 521(a)(3) of SMCRA and 30 CFR 722.13 to issue a CO. Gray Knob Coal Co. v. OSMRE, 98 IBLA 171, 173 (1987); B&J Excavating Co. v. OSMRE, 89 IBLA 129, 135 (1985); Hayden & Hayden Coal Co., 2 IBSMA 238, 87 I.D. 414 (1980).

Appellant's principal contention is that the December 18, 1984, settlement agreement was intended to be an accord and satisfaction of all OSMRE

violations, including CO No. 84-83-71-01. It asserts that under Kentucky law "a compromise settlement, when full and complete and fairly made, operates as a merger of and bars all right to recovery on all claims and causes of action included therein" (Statement of Reasons (SOR) at 3). While admitting that the CO and claim of penalty therefor were not specifically set out in the agreement, Bright contends that the penalty for this CO was not specifically excluded from the agreement and "the law placed the burden on OSMRE to specifically exclude, by appropriate language, the Cessation Order No. 84-83-71-01 from the settlement agreement if it was not settled thereby" (SOR at 5).

Appellant also asserts that under Kentucky law, an agreement may be explained by parole evidence. It contends the Judge's finding is not supported by any evidence in the record because

> the undisputed testimony that the parties intended to include the cessation order in the settlement agreement of December 18, 1984, coupled with OSM's actions in not entering an abatement of the cessation order or assessment thereon until over one year after the cessation order was issued requires a finding that the settlement agreement of December 18, 1984, was in full satisfaction and accord for all of the appellant's OSM violations, including Cessation Order No. 84-83-71-01.

(SOR at 6).

Bright argues that "[i]t is unreasonable to consider that appellant would enter into the settlement agreement of December 18, 1984, and leave the appellee the absolute decision to stop its mining by reason of the cessation order" (Appellant's Reply Brief at 2).

OSMRE has responded that the Judge's decision should be upheld because CO No. 84-83-71-01 was validly issued, and because of appellant's failure to timely abate the violation by paying outstanding reclamation fees within the time specified in the NOV. OSMRE maintains that the settlement agreement of December 18, 1984, did not resolve any issues pertaining to CO No. 84-83-71-01 because OSMRE never intended to include that CO as a part of the settlement. OSMRE states that the agreement did not affect other OSMRE enforcement activities. OSMRE asserts that the intent of the parties is clearly stated on the face of the agreement, and that "[i]t does not contain any language which explicitly or implicitly settles or in any way deals with Cessation Order No. 84-83-71-01" (OSMRE Response at 6). OSMRE also argues that this Board should not rely upon Hogg's present interpretation of the settlement agreement because Hogg did not take part in settlement negotiations or speak with OSMRE representatives prior to the time of execution. According to OSMRE, his misinterpretation of that agreement "has no basis within the written document and is patently contrary to its specific language" (OSMRE Response at 7).

[2] After review of the record, we conclude that Judge McGuire correctly found that the December 18, 1984, settlement agreement did not include CO No. 84-83-71-01, even though this CO addressed the same subject

matter as the two court judgments. Bright does not challenge the validity of the NOV or the CO. In fact, appellant specifically points to the settlement agreement provision for dismissal of its petition for review and pay-ment of $2,700 as full satisfaction of the NOV. However, appellant has presented nothing with this appeal to persuade us that both the Government and Bright intended to resolve the outstanding CO No. 84-83-71-01 as well. A careful review of the settlement agreement would indicate otherwise.

The settlement agreement sets out the specific issues resolved by the parties. The agreement specifically refers to the two court judg-ments against Bright (Civil Action No. 83-262 and Civil Action No. 84-194). The agreement refers to the negotiations for a proposed plan of payment in satisfaction of these judgments. It sets out the total amount then owing, and calls for an initial payment of $15,000, with additional monthly installments of $1,500 commencing March 1, 1985, and continuing until the company's liability on the judgments is exhausted. The agreement also specifically refers to the pending review of NOV No. 84-83-71-002, calling for Bright to withdraw its application for administrative review and promptly pay a civil penalty of $2,700. There is no reference to CO No. 84-83-71-01 anywhere in the document.

The settlement agreement specifically states that it is applicable only to those issues set out in the document:

> This Payment Agreement is entered into between the United States Department of the Interior, Office of Surface Mining, first party, and Bright Coal Company, Inc., second party, for the purposes herein contained and no others.

(Agreement at l);

> The parties agree that this writing constitutes their entire agreement. No alterations may be made to this agreement unless in writing and signed by both parties, and waiver of any condition or obligation of this agreement by first party for a particular violation thereof shall not constitute waiver of any future violation, nor limit the legal rights of first party hereunder.

(Paragraph 9 of Agreement at 3);

> First party agrees to refrain from taking any further collection actions with respect to the judgments aforesaid, provided second party faithfully fulfills all of its obligations under this agreement. Nothing in this agreement shall be construed as a waiver of any right or power under the Surface Mining Act, 30 U. S. C. | 1201 et seq., currently held by the first party, relating to the regulation or enforcement of rules and regulations under the said Act, or concerning any additional reclamation fees as they may accrue in the future.

(Paragraph 11 of Agreement at 3).

The CO in question was outstanding long before the settlement agreement was executed, and appellant had sufficient motivation and opportunity to include the CO in the terms of the settlement, as was the case for the NOV. The failure to do so may well have been an oversight by appellant's representatives, or a misunderstanding of the scope of the agreement. It remains that the agreement clearly did not address the CO. At this juncture, we are not willing to alter the stated terms of the settlement document by incorporating the CO, when one of the signatories adamantly maintains it was never intended that the CO be subject to the agreement. Hogg's limited testimony was insufficient to overcome the specific wording of the agreement.

Under the circumstances of this case, there could not have been mutual assent by the parties to the inclusion of this CO in the settlement. When the language of the document is plain and unambiguous, the intent of the parties must be gathered from that language, no matter what the actual or secret intention of the parties may have been. See 17 Am. Jur. 2d., Contracts | 245, and cases cited therein. Judge McGuire properly found appellant's attempt to expand the agreement through parole evidence was not acceptable.

We are similarly not persuaded by appellant's argument that Kentucky law of accord and satisfaction requires a complete merger of all claims relating to reclamation fees in this settlement agreement. First, the scope of any compromise agreement is dependent on the language used in the settlement document. The language of the settlement agreement is not all inclusive as appellant alleges. It is clear from the express language of the settlement agreement that the parties did not intend to settle all claims relating to reclamation fees, nor did the agreement purport to be a full and final settlement. In paragraph 6 of the agreement, OSMRE reserved the right to impose any administrative and/or legal remedies for violations of SMCRA where it provides:

> Further, the failure of second party to perform any of the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. | 1201 et seq., shall result in the imposition of any and all administrative and/or legal remedies available to the Office of Surface Mining. The failure to make payments as and when due under this agreement may result in the issuance of a Notice of Violation and/or Cessation Order.

The case law cited by appellant is easily distinguishable from the facts at hand. The language used in the various compromise or settlement agreements was clearly intended to be all inclusive, i.e., to settle "all" matters in dispute between the parties. We agree that, when broad general language is used to manifest a general release of claims, a party would be required to specifically set out a related matter it intends to exclude from the scope of the agreement. However, the settlement agreement now before us contains no broad language releasing Bright from all related claims, and there was no need to specify excluded unsettled matters. See United States v. William Cramp & Sons Ship & Engine Building Co., 206 U.S. 118, 27 S. Ct. 67 (1907); Terrill v. Carpenter, 143 F. Supp. 747 (E.D. Ky. 1956). The agreement lists the issues being settled and settles only those issues

specifically listed. Accordingly, we are not constrained to charge OSMRE with the consequences of failing to specifically state that the CO was excluded from the settlement agreement.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.l, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

Kathryn A. Lynn
Administrative Judge
Alternate Member